

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JOHN ZAPPOLA,	) CASE NO. 1:10CV1075
	)
Plaintiff/Counterclaim	) JUDGE
Defendant.	)
	)
v.	) <b><u>NOTICE OF REMOVAL</u></b>
	)
ROCK CAPITAL SOUND	)
CORPORATION, et al.	)
	)
Defendants.	)
	)
and	)
	)
RCS CORPORATION,	)
	)
Defendant/Counterclaim	)
Plaintiff.	)
	)
v.	)
	)
HUGHIE'S AUDIO VISUAL SERVICE,	)
INC.,	)
	)
Counterclaim Defendant.	)
	)

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OHIO:**

Defendants Rock Capital Sound Corporation (“RCSC”), RCS Corporation (“RCS Corp”), and Gary J. Jurist (“Jurist”) (collectively referred to herein as “Defendants”) hereby remove to the United States District Court for the Northern District of Ohio, Eastern Division the action described below and state as follows:

## **INTRODUCTION**

1. On September 16, 2009, Plaintiff John Zappola (“Plaintiff”) filed an action (the “State Action”) captioned *John Zappola v. Rock Capital Sound Corporation, RCS Corporation, and Gary J. Jurist*, Case No. CV-09-704318, in the Cuyahoga County Court of Common Pleas. Copies of all process, pleadings, and orders served on Defendants in the State Action are attached as Exhibit 1.

2. Thereafter, Plaintiff filed an Amended Complaint, and Defendants were served with the Amended Complaint on April 14, 2010. The Amended Complaint was the first time Plaintiff asserted removable violations of federal law. A copy of Plaintiff’s Amended Complaint is attached as Exhibit 2.

3. Defendants remove this case pursuant to 28 U.S.C. § 1441 as an action over which this Court has federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(a). This case raises a federal question and is removable on the following basis: Plaintiff raises a claim for benefits and/or seeks to enforce rights against Defendants that are covered by the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, *et seq.* To the extent Plaintiff is alleging a state law claim for benefits, federal law completely preempts that claim.

## **NATURE OF THE CASE**

4. In Count III of the Amended Complaint, Plaintiff brings a cause of action relating to his 401(k) retirement plan (the “Plan”). Plaintiff alleges that Defendants denied him “access to the monies he held in deposit in his 401(k) retirement plan.” He also alleges that Defendants established and/or maintain the Plan. See Amended Complaint ¶¶ 8, 9.

5. Count III therefore seeks benefits allegedly due to Plaintiff and/or seeks to enforce rights allegedly due to Plaintiff under the Plan. *Id.*

6. The Plan is an employee benefits plan covered by ERISA, and ERISA contains the

exclusive remedy for obtaining benefits under such a plan. *See* 29 U.S.C. § 1132 (a participant or beneficiary may bring an action “to recover benefits due to him under the terms of his plan, [and] to enforce his rights under the terms of the plan . . .”).

7. Therefore, Plaintiff’s Count III is an action completely preempted by ERISA over which this Court has jurisdiction. *See* 29 U.S.C. § 1132(e) and (f); *Wright v. Gen. Motors Corp.*, 262 F.3d 610, 613 (6th Cir. 2001) (“if the claim is complete[ly] preempt[ed] by ERISA, that is, when the action is to recover benefits, enforce rights or clarify future benefits under an ERISA plan, [it] is . . . subject to removal to the federal courts”) (quotations omitted).

#### **GROUNDS FOR REMOVAL**

8. This case is removable pursuant to 28 U.S.C. § 1441 based on federal question jurisdiction existing under 28 U.S.C. § 1331. The Court has federal question jurisdiction because Plaintiff is seeking benefits under an employee welfare plan governed by ERISA.

9. Under 28 U.S.C. §§ 1367 and 1441(c), only one cause of action in a case need be subject to federal jurisdiction and removable in order for the Court to have jurisdiction to determine all issues in the case. Therefore, all of Plaintiff’s claims are removable to this Court.

10. This Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b) because Defendants are filing this Notice of Removal within 30 days of being served with Plaintiff’s Amended Complaint, the amended pleading first alleging removable violations of federal law.

11. Defendants are the only defendants within the meaning of 28 U.S.C. § 1441 named in this action, and they hereby consent to the removal of the State Action to this Court.

12. Venue is proper in this District and Division pursuant to 28 U.S.C. § 1441(a) and 29 U.S.C. § 1132(e)(2).

13. By filing this Notice of Removal, Defendants do not waive any defenses to the claims

asserted by Plaintiff which may be available to them, or concede that Plaintiff has pleaded any claim upon which relief can be granted.

14. Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly provide written notice of this removal to the Cuyahoga County Court of Common Pleas, Civil Division. A copy of the Notice of Filing Notice of Removal is attached hereto as Exhibit 3.

**WHEREFORE**, Defendants notice that the above-described action in the Cuyahoga County Court of Common Pleas, Civil Division is removed to this Court.

Respectfully submitted,

/s/ Charles F. Billington III  
David A. Campbell (0066494)  
Charles F. Billington III (0083143)  
Vorys, Sater, Seymour and Pease LLP  
2100 One Cleveland Center  
1375 East Ninth Street  
Cleveland, Ohio 44114-1724  
Telephone: 216-479-6100  
Facsimile: 216-479-6060  
E-mail: [cfbillington@vorys.com](mailto:cfbillington@vorys.com)  
[dacampbell@vorys.com](mailto:dacampbell@vorys.com)

*Attorneys for Defendants Rock Capital Sound Corporation, RCS Corporation, and Gary J. Jurist*

**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via regular U.S. mail, postage-prepaid, this 12th day of May, 2010, to:

James M. Johnson, Esq.  
1600 Illuminating Building  
55 Public Square  
Cleveland, Ohio 44113  
*Attorney for Plaintiff/Counterclaim*  
*Defendant John Zappola*

and

Richard Demsey, Esq.  
Richard L. Demsey Co., L.P.A.  
1350 Euclid Avenue  
Suite 1550  
Cleveland, Ohio 44115

*Attorney Hughie's Audio Visual Service*

/s/ Charles F. Billington III  
Charles F. Billington III (0083143)  
Vorys, Sater, Seymour and Pease LLP  
2100 One Cleveland Center  
1375 East Ninth Street  
Cleveland, Ohio 44114-1724  
Telephone: 216-479-6100  
Facsimile: 216-479-6060  
E-mail: cfbillington@vorys.com

*One of the Attorneys for Defendants Rock Capital  
Sound Corporation, RCS Corporation, and Gary J.  
Jurist*